STATE OF MICHIGAN

COURT OF APPEALS

JUDY BETH AEBIG,

Plaintiff/Counter-Defendant-Appellee,

v

GRETCHEN COX and TERRY COX,

Defendants/Counter-Plaintiffs/Cross-Defendants-Appellants.

UNPUBLISHED
May 18, 2006

No. 258505
Grand Traverse Circuit Court
LC No. 02-022039-CK

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Defendants appeal from a garnishment order entered against real property (the property) formerly held by defendant Terry Cox's Individual Retirement Account (the IRA). We affirm.

This case arose out of a February 20, 2003, judgment plaintiff obtained against defendants, on which plaintiff attempted to collect. After numerous attempts to reach defendants' assets, on March 26, 2004, plaintiff moved to satisfy her judgment by executing on real property owned by the IRA. Plaintiff argued that the IRA had ceased to be an IRA pursuant to 26 USC 408(e)(2)(A) because defendant Terry Cox had improperly leased the property to Mr. Bear's Lair, a Subchapter-S corporation, 26 USC 1361(a), solely owned by defendant Gretchen Cox, Terry Cox's wife. On June 2, 2004, the trial court issued a garnishment order, finding that the IRA had entered into a "prohibited transaction" under 26 USC 4975(c)(1)(A). However, upon learning that defendants had filed for bankruptcy in the meantime, the trial court stayed that order. The United States Bankruptcy Court lifted its stay on September 15, 2004, and the trial court reinstated its garnishment order on September 27, 2004. Defendants appeal.

Defendants first argue that the circuit court lacked subject matter jurisdiction over plaintiff's motion to aid in execution of the property. We disagree. We review whether a court has subject matter jurisdiction de novo. *Davis v Dep't of Corrections*, 251 Mich App 372, 374; 651 NW2d 486 (2002). We also review de novo issues of statutory interpretation. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). Unless implicitly or explicitly precluded by Congress, state courts are presumed competent to exercise subject-matter jurisdiction over federal-law claims. *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 493; 697 NW2d 871 (2005).

Defendants first argue that 29 USC 1132 of the Employee Retirement Security Income Act (ERISA) vests exclusive jurisdiction with the federal courts to determine whether Terry Cox's self-directed IRA was terminated by a prohibited transaction. Under § 1132(e)(1), jurisdiction is prescribed as follows:

> (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of *civil actions under this subchapter* brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section. [Emphasis added.]

"This subchapter" refers to subchapter I, 29 USC 1001-1191c, so § 1132(e)(1) generally provides that federal district courts have exclusive jurisdiction over civil actions brought under those sections. However, plaintiff brought this action in state court under state law, asserting breach of contract, fraud, misrepresentation, and violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*. Therefore, 29 USC 1132(e)(1) does not divest the circuit court of jurisdiction over the subject matter in this action.

Defendants also claim that 26 USC 7476 provides the United States Tax Court with exclusive jurisdiction over this matter. However, plaintiff never sought declaratory relief under that section. Because plaintiff is not "a petitioner who is the employer, the plan administrator, an employee who has qualified under regulations prescribed by the Secretary as an interested party for purposes of pursuing administrative remedies within the Internal Revenue Service, or the Pension Benefit Guaranty Corporation," 26 USC 7476(b)(1), plaintiff did not have standing to sue under that section. In the absence of any other indication that Congress intended to confine jurisdiction to the federal courts, we conclude that the circuit court had jurisdiction in this matter.

Defendants then argue that the circuit court erred in concluding that Mr. Bear's Lair was a "disqualified person" under 26 USC 4975(e)(2), making the lease at issue a prohibited transaction under § 4975(c)(1)(A). We disagree.

Generally, an IRA is exempt from executions to collect on a judgment. MCL 600.6023(1)(k). However, under 26 USC 408(e)(2)(A) of the Internal Revenue Code, an IRA ceases to be an IRA as follows:

> If, during any taxable year of the individual for whose benefit any individual retirement account is established, that individual or his beneficiary engages in any transaction prohibited by [26 USC 4975] with respect to such account, such account ceases to be an individual retirement account as of the first day of such taxable year.

A "prohibited transaction" under 26 USC 4975(c)(1)(A) means, in relevant part, "any direct or indirect . . . sale or exchange, or leasing, of any property between a plan and a disqualified person." The parties do not dispute that the IRA was a "plan" for the purposes of the Internal Revenue Code. 26 USC 4975(e)(1). Therefore, the question is whether the lease with Mr. Bear's Lair constituted a transaction with "a disqualified person."

There is no dispute that Gretchen Cox, personally, would be "a disqualified person" because she is "a member of the family" under § 4975(e)(2)(F), the definition of which includes a spouse. 26 USC 4975(e)(6). However, the transaction was between the IRA and the corporation. Even where one individual is the sole owner of all stock in a Subchapter-S corporation, the corporation must ordinarily be respected as a distinct entity in the absence of a subversion of justice or other overriding public policy. *Rymal v Baergen*, 262 Mich App 274, 293; 686 NW2d 241 (2004); *Ross v Auto Club Group*, 269 Mich App 356, 361; ___ NW2d ___ (2006). We do not now address whether the circumstances of this case warrant piercing the corporate veil.

Therefore, most of the list of "disqualified persons" could not apply because they refer to individuals. The only possible disqualification is listed under 26 USC 4975(e)(2)(G) as follows:

> a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of –
>
> (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,
>
> (ii) the capital interest or profits interest of such partnership, or
>
> (iii) the beneficial interest of such trust or estate,
>
> is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E).

Again, Gretchen Cox owned more than 50 percent of all stock in Mr. Bear's Lair, so if she is a person listed under § 4975(e)(2)(A) through (E), the *corporation* that she owns would be a "disqualified person" without any need to pierce the corporate veil.

Further, § 4975(e)(2)(G) includes direct *or* indirect ownership. Under § 4975(e)(4), "indirect stockholdings which would be taken into account under [26 USC 267(c)]" are included for the purposes of § 4975(e)(2)(G)(i). Among other provisions, 26 USC 267(c)(2) states that "[a]n individual shall be considered as owning the stock owned, directly or indirectly, by or for his family." By operation of 26 USC §§ 267(c)(2), 4975(e)(2)(F), and 4975(e)(4), Terry Cox must be considered an indirect owner for the purposes of 26 USC 4975(e)(2)(G). Therefore, if either Gretchen *or* Terry Cox qualify under § 4975(e)(2)(A) through (E), the corporation would be a "disqualified person."

The IRA was a self-directed IRA that Terry Cox managed and controlled. Therefore, Terry Cox was a "fiduciary" of the IRA as defined by § 4975(e)(3), including anyone who "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets" or who "has any discretionary authority or discretionary responsibility in the administration of such plan." A fiduciary is a "disqualified person" by operation of § 4975(e)(2)(A). Therefore, Terry Cox's indirect ownership of Mr. Bear's Lair, as a person described in subparagraph (A), renders the corporation a "disqualified person" under subparagraph (G).

Defendants finally argue that the trial court erred by failing to consider the possibility of a good faith exception to finding the transaction prohibited, as they allege is permitted under 26 USC 4975(c)(2) of the Internal Revenue Code and 29 USC 1108 of the Employee Retirement Income Security Program (ERISA). We disagree. The latter section is inapplicable because there is no issue here regarding transactions prohibited by ERISA. The former section unambiguously provides that only the Secretary of the Treasury[1] has the authority to grant an exception, and even then "only after consultation and coordination with the Secretary of Labor," who has already denied defendants an exception. The trial court has jurisdiction to determine whether a prohibited transaction took place, but it has no jurisdiction to consider granting an exception.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis

[1] Or the Secretary's delegate. 26 USC 7701(a)(11)(B).